In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,
Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AND BRIEF, AS AMICUS CURIAE, ON BEHALF OF AMERICAN RETAIL FEDERATION

CHARLES B. RUGG,
Amicus Curiae

WARREN E. CARLEY,
ROPES, GRAY, BEST, COOLIDGE & RUGG,
50 Federal Street,
Boston, Massachusetts,
Of Counsel.

GEORGE H. ELLIS CO., PRINTERS, BOSTON

INDEX

AUTHORITIES CITED

PAGE

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,

Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a brief as *amicus curiae* in the above-entitled case. Counsel for both parties have assented in writing as indicated by letters filed with the clerk of this Court.

This application is made by the undersigned as counsel for American Retail Federation, Washington, D. C., members of which include 19 national and 30 state retail associations. A list of these members is attached hereto as Appendix A. The question involved in this case is of direct interest to the members of the Federation.

Respectfully submitted,

CHARLES B. RUGG

WARREN E. CARLEY,
ROPES, GRAY, BEST, COOLIDGE & RUGG,
50 Federal Street,
Boston, Massachusetts,
Of Counsel.

February, 1945

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 608

A. H. PHILLIPS, INC.,
Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court (R-11-20) is reported in 50 F. Supp. 749, and the opinion of the United States Circuit Court of Appeals for the First Circuit (R-23-30) is reported in 144 F. (2d) 102.

JURISDICTION

Jurisdiction is conferred under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether record clerks and stock clerks employed in the central office and warehouse of a retail chain-store enterprise are "engaged in any retail . . . establishment . . ." under Section 13(a)(2) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; 29 U. S. C. Sec. 201 *et seq.*)

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in Appendix B *infra*, p. 36.

STATEMENT OF THE CASE

A. H. Phillips, Inc. is engaged in the retail grocery business in Western Massachusetts and Northern Connecticut. It operates forty-nine stores. All are within radius of thirty-five miles of Springfield, Massachusetts, where its offices and warehouse are located. (R-13). Nine of the stores are in Connecticut. Its annual gross business approximates $1,500,000. (R-11).

The warehouse services all the stores. Except for bread, pastry and milk, which is secured from local sources (R-14, 15), the merchandise is delivered at the warehouse before it is divided and delivered to the individual stores according to need. (R-14). Most (eighty percent) of the merchandise comes from states other than Massachusetts. (R-13). A record is kept of the goods stored at the warehouse at all times and the average inventory at the warehouse approximates fifteen percent of the gross annual business. Merchandise arrives at the warehouse by rail and truck and is delivered to the stores by means of the petitioner's own trucks. (R-14). The merchandise is then sold and delivered at the several retail stores. (R-11).

The stores are so situated that they do not compete with each other, but the competition with other grocery stores is

very keen. Next to the cost of goods sold, wages constitute the largest item of expense. (R-12). Each store has its own manager, who, in turn, is responsible to one of three division superintendents. Separate accounts are kept for each store and transfers of merchandise between stores are frequent.

The checking of invoices, paying of bills, checking of direct deliveries, keeping of records of warehouse inventory, making up of payrolls and the maintaining of the inventories of each store, together with the keeping of its cash and credit records, is all done by office employees who work in the central offices located in the same building as the warehouse. (R-15, 16). A receiving clerk and a shipping clerk also work there and three superintendents have headquarters in the same building. Warehousemen and helpers handle the incoming and outgoing merchandise and the storing of it at the warehouse. There is no attempt made to segregate the duties of any employee between activities which cross state lines or which relate to merchandise which has crossed or will cross state lines and those that do not.

A complaint was filed in March, 1942, seeking to enjoin the defendant from asserted violations of the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act. The defendant filed an answer denying that employees were subject to the provisions of Sections 6 and 7 of that Act and asserting that the exemptions in Sections 13(a)(1) and 13(a)(2) applied to its central office and warehouse employees. At the trial before the United States District Court, the facts were stipulated by the parties and adopted by the trial judge. (R-11).

SUMMARY OF ARGUMENT

An examination of the entire legislative background of Section 13(a)(2) shows the words "retail . . . establishment" refer to a retail enterprise considered as a whole

and fails to reveal any Congressional intention to apply that exemption to parts but not to all of an integrated retail enterprise. A construction of the words "retail . . . establishment" that comprehends an integrated business is in line with prevailing and accepted governmental and business usage and is in harmony with the facts relating to the petitioner's business. However, even if each physically separated unit is considered a separate establishment, similar considerations indicate that the central office and warehouse building that functions as an integral part of a retail business is, nevertheless, a "retail . . . establishment". Any construction of Section 13(a)(2) that shrinks the scope of its coverage so as to exclude such a central building or warehouse, produces, as a practical matter, such absurd consequences that it cannot be presumed to have been the construction intended by Congress.

PRELIMINARY STATEMENT

This brief is filed on behalf of the American Retail Federation, Washington, D. C. Membership in this association includes the nineteen national and thirty state retail associations listed in Appendix A, the membership of which, in turn, includes more than 500,000 stores.

Most retailers serve a single local community but many retail enterprises serve several local communities.[1] Sometimes these communities are situated in more than one state but more often they are all located within a single state. In either case a very large proportion of the merchandise sold comes from states other than the one where the stores are located and very frequently the retailer uses a warehouse rather than space in the stores for receipt of that merchandise and its storage before it is delivered to the stores for sale. Moreover many retail enterprises with

[1] See Statistical Abstract of the United States, 1942 (U. S. Department of Commerce, Bureau of the Census) p. 969, Table No. 940.

more than one store have found it more efficient and economical to have the executive and clerical staff centrally located.

This case presents the problem of determining the status under the Fair Labor Standards Act of employees working in warehouses and central office buildings that function as an integral part of a retail business. Such retail businesses may vary in size from a store that has a single outside storeroom to business enterprises with thousands of selling units and scores of buildings devoted to warehouses and processing plants. The petitioner's business is typical of a large group of retail enterprises[2] that engage solely in the distribution of merchandise at retail through one or more stores, serviced by one or more warehouses and with the executive officers and the record and payroll clerks located in a central office. Accordingly, a decision by this Court of the issue raised in this case is of direct interest to the many retailers in this country who are connected directly or indirectly with the American Retail Federation.

The petitioner is engaged in selling groceries at retail to customers, some of whom are in Connecticut, most of whom are in Massachusetts, but all of whom are within the comparatively small area of thirty-five miles from the City of Springfield, Massachusetts. The actual retail sales are, of necessity, made in its forty-nine stores. As in any retail business, the sale of its merchandise to the consumer is the petitioner's goal and its entire organization is designed to accomplish those sales in the most efficient manner. The petitioner operates in a highly competitive field (R-12) and efficiency of operation is obviously necessary if the enterprise is to prosper. Efficiency of operation required that

[2]It must not be supposed that only a few companies or owners operate more than one store. See, Statistical Abstract of United States, *Supra*, pp. 967-972. The evidence in *Tax Commissioners v. Jackson*, 283 U. S. 527, 532, indicated that in a depression year in the typical state of Indiana there were more than 500 companies or persons who operated two or more stores.

certain phases of the business be segregated and consequently the petitioner established a central building in Springfield, Massachusetts, where its executive offices are located and where it employs some clerks who keep inventory, accounting or like records, and some clerks who store, move, receive, ship, mark, or otherwise handle goods. With the overall administrative and executive functions thus centrally located, the petitioner operates as an integrated whole with its nerve center situated in Springfield.

The Administrator of the Wages and Hours Division has sought to split an integrated business by driving a wedge between that part of the petitioner's business that happens to be conducted in the stores and the part that is carried on in the central building. Although the Administrator has been given no statutory power to construe the exemption contained in Section 13(a)(2) of the Act, he pulverizes unified retail enterprises in an attempt to bring parts within the Act by insisting, for example, that the stock clerk working in the storehouse must be treated in accordance with the Act, while the stock clerk working in the store and performing the same or substantially similar work, need not be so treated.

Since the petitioner's business is typical of many other retail businesses,[3] the decision by this Court as to whether the petitioner's record clerks or stock clerks are covered by the Fair Labor Standards Act is of the greatest importance to the retail industry generally.

It is this last fact which prompts us to call attention to the fact that in a case of this type there are ordinarily[4] two questions presented for decision: first, whether there is initial coverage for the central office and warehouse em-

---

[3] See Note 2, *supra*.

[4] For example, see *Walling* v. *Goldblatt Bros. Co.* (CCA 7) 128 F. (2d) 778; cert. den. 318 U. S. 757; s.c. 56 F. Supp. 255; *Walling* v. *Block* (CCA 9) 139 F. (2d) 268; cert. den. 321 U. S. 788; *Walling* v. *L. Wieman Co.* (CCA 7) 138 F. (2d) 602 cert. den. 321 U. S. 785.

ployees under Sections 6 and 7 of the Act, and second (the question presented in the instant case), whether, if there is such coverage, the employees are covered by any of the retail exemptions in the Act. For some reason not known to us, the first question is not raised in this case. We doubt that, on the present record, with its vague and summary descriptions of the duties of the individual employees involved, such question could adequately be presented.

The Administrator, as the instant proceeding bears witness, has been ever vigilant to maintain the broadest possible scope of jurisdiction under this Act, and, until rejected by the cases of *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572, pressed the notion that all warehouse employees occupied an intermediate, not terminal, position in interstate commerce.[5] The Administrator has revived his notion. Although it takes a slightly different form, the Administrator's claim is that the continuity of movement through warehouses connected with retail stores is sufficiently rapid to warrant the application of coverage under the Act.[6] Rapid turnover of inventory is a traditional objective of merchandising. In some lines of businesses, as for instance those involving the sale of perishable articles, the inventory turnover must be rapid if a business is to survive. However, in these days of shortages the turnover is rapid in nearly every mercantile enterprise since it is practically impossible to accumulate any backlog of merchandise. Consequently, the Administrator's slightly altered claim in

---

[5]See: Brief for Petitioner, *Walling* v. *Jacksonville Paper Co.* No. 336, October Term 1942, pp. 13-18; Petition for Certiorari, *Walling* v. *Goldblatt Bros. Inc.*, No. 418, October Term 1942, pp. 9-11.

[6]See, for example, the following cases decided after the *Jacksonville* opinion: *Walling* v. *L. Wieman Co.* (CCA 7) 138 F. (2d) 602, 605; *Allesandro* v. *C. F. Smith Co.* (CCA 6) 136 F. 2d 75, ; *Walling* v. *Consumers Co.*, 57 F. Supp. 523, 524; *Walling* v. *Goldblatt Bros.*, 56 F. Supp. 255, 256, 7.

respect of coverage is about as broad as it was before the decisions in the *Jacksonville* and *Higgins* cases.

We think the questions of (1) whether employees in retailers' central offices and warehouses are engaged "in commerce"; (2) whether the "practical continuity of transit" to which reference was made by Mr. Justice Douglas in the *Jacksonville* opinion[7] properly applies to a warehouse operated as an integral part of a *retail* business, and if it does apply (3) how rapid must warehouse inventory turn over be before there is "that practical continuity of transit"—all are questions of sufficient importance to justify their separate consideration in a decision based on an adequate record. We mention these facts because, in the absence of a clear statement indicating that such is not the intent, there appears to be a possibility of all three questions being decided *innuendo* in the instant case if the failure to raise the initial coverage question in the instant proceeding were considered the equivalent of a decision in favor of the contentions advanced by the Administrator.

ARGUMENT

PETITIONER'S CENTRAL OFFICE AND WAREHOUSE EMPLOYEES ARE ENGAGED IN A "RETAIL . . . ESTABLISHMENT" WITHIN THE MEANING OF SECTION 13(A)(2) OF THE FAIR LABOR STANDARDS ACT.

Section 13(a)(2) provides that the wage and hour sections of the Act, Sections 6 and 7, shall not apply with respect to "any employee engaged in any retail or service establishment, the greater part of whose selling or servicing

[7] "We do not mean to imply that a wholesalers' course of business based on anticipation of needs of specific customers rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' within the meaning of the Act." 317 U. S. 564, 570.

is in intrastate commerce". A difficulty has arisen because the Administrator, although having no special power to construe this section of the Act, has asserted[8] that, in his view, an "establishment" means a physically separated building and that a central office and warehouse functioning as part of a retail enterprise is not a "*retail . . . establishment*". These assertions by the Administrator are entitled to scant consideration in this case.[9] The Administrator's stubborn insistence upon the correctness of his own inter-

---

[8]Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, issued December 7, 1939, and reprinted in 1940, Wage and Hour Manual (Bureau of National Affairs, Inc., Washington, D. C.) pp. 154-158; revised and reissued June 16, 1941, and reprinted in 1942 Wage and Hour Manual, pp. 326-347.

[9]This is not a situation to which the doctrine that interpretative bulletins carry persuasion as an expression of the view of those charged with responsibility of administering the Act, is fully applicable. See *Overnight Motor Co.* v. *Missel*, 316 U.S. 512, 580-581, n. 17; *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 539. The interpretation by the Administrator covering retail employees that work in central office and warehouse buildings has been resisted from the first. See: *Walling* v. *Block*, (CCA 9) 139 F. (2d) 268; cert. den. 321 U. S. 788; *Walling* v. *L. Wieman Co.* (CCA 7), 138 F. (2d) 602; cert. den. 321 U. S. 785; *Allesandro* v. *C. F. Smith Co.* (CCA 6) 136, F. (2d) 75; *Fleming* v. *American Stores Co.* (CCA 3) 133 F. (2d), 840; *Walling* v. *Goldblatt Bros.* (CCA 7), 128 F. (2d), 778; cert. den. 318 U. S. 757; *Tagler et al* v. *Carpenter Coal Co.* (USDC N.D. Ill. E.D.) 57 F. Supp. 314; *Walling* v. *Consumers Co.* (USDC N.D. Ill. S. D.) 57 F. Supp. 523; *Walling* v. *Goldblatt Bros. Inc.* (USDC N.D. Ill.) 56 F. Supp. 255; *Vogelpohl* v. *Lane Drug Co.* (USDC N.D. Ohio) 55 F. Supp. 564; *Wheeling* v. *Roland Electrical Co.* (USDC D. Md.) 54 F. Supp. 733; *Walling* v. *Fred Wolferman, Inc.* (USDC W.D. Mo., W.D.) 54 F. Supp. 917 *Remington* v. *Shaw* (USDC W.D. Mich.) 52 F. Supp. 465; *White* v. *Jacobs Pharmacy Co.* (USDC N.D. Ga.) 47 F. Supp. 298; *Duncan* v. *Montgomery Ward & Co., Inc.* (USDC S.D. Texas) 42 F. Supp. 879; *Veazey Drug Co.* v. *Fleming* (USDC W.D. Okla.) 42 F. Supp. 689; *Jehs* v. *Singer Sewing Machine Co.* (USDC N.D. Okla.) 1 W.H. Cases, 814.

pretation, in the face of overwhelming[10] judicial authority to the contrary, is not a factor that should persuade any court to adopt that interpretation.

The word "establishment" also appears in Section 12(a) of the Act pursuant to which the shipment in interstate commerce of "any goods produced in an establishment situated in the United States in or about which . . . any oppressive child labor is employed . . ." is prohibited. It may be argued that "establishment" as used in Section 12(a) refers to a place and Congress intended that the same meaning be given to the word in Section 13(a)(2).

---

[10]See cases cited in footnote 9. Except for the dissenting opinion in *Walling* v. *Block*, 139 F. (2d) 268, the case at bar stands alone as an instance where the Administrator's interpretation, as applied to a retail business of which the petitioner's is typical, finds judicial support. *Walling* v. *American Stores Co.* 133 F. (2d) 840 CCA 3) is clearly and markedly distinguishable since it was a large enterprise which, in addition to 2300 stores and several warehouses, included processing and manufacturing plants and subsidiary corporations. The Court refused to call such an industrial octopus a single retail establishment. *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778, has sometimes been mistakenly assumed to give judicial approval to the Administrator's interpretation, because in discussing the exemptions in the Act the statement was made (p.783), ". . . we think that such elimination of applicability was intended to include only ordinary stores, Fair Labor Standards Act of 1938, §13(a) (2) . . . and not a great *establishment* shipping supplies out of the state to two of its important outlets" (italics supplied). A careful reading of that decision indicates that the language relates "to employees who *manufacture* goods in the warehouses for shipment to Indiana" (italics supplied). The Court later in the opinion points out that the exemption issue was not before it. It is significant, however, that the Court's use of the word "establishment" in the first quotation to mean the entire Goldblatt enterprise is precisely the opposite of what the Administrator contends is meant by that word. Even in a situation which presents the collarary proposition, the courts have with the exception noted above, been consistent. Thus the Supreme Court of Tennessee in holding a business which included wholesaling and manufacturing as well as retail operations, not to be a retail establishment", examined the entire business enterprise. *Johnson* v. *Phillips-Buttdorf Mfg. Co.*, 178 Tenn. 559, 561, 160 S.W (2d) 893.

We submit that even if the word "establishment" as used in Section 12(a) were given the meaning for which the Administrator contends, it does not follow that it must be similarly defined when used in Section 13(a)(2).

> "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Courtauld* v. *Legh*, L.R.4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. . . . It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433.

The legislative background of the two sections is not the same. The child labor section of the Fair Labor Standards Act had a legislative history distinct from the rest of that statute. See *Western Union Telegraph Co. v. Lenroot*, October Term 1944, No. 49, decided January 8, 1945. The scope of the two sections is different. Section 12(a) does not apply to child labor employed directly in interstate commerce. *Ibid.* On the other hand, Section 13(a)(2)

since it involves the distributive and not the manufacturing trades, applies only to employers "engaged in commerce" and not those "engaged . . . in the production of goods for commerce" (Sections 6 and 7). Consequently, the subject matter to which the word "establishment" refers in Sections 12(a) and 13(a)(2) can not be the same in each case. Still another reason exists: the scope of the legislative power exercised in the child labor section is broader than that exercised in the sections establishing the retailers' exemptions. The second phrase of coverage, namely, "engaged in the production of goods for commerce" when read in the light of the pertinent definitions in Section 3, more nearly exhausts the plentitude of Congressional authority to regulate commerce than the first phrase of coverage—"engaged in commerce".[11] With this variance in legislative history, scope, subject matter and exercise of legislative power regardless of the meaning given to the word "establishment" in the child labor section of the act, no reason exists for not giving to the word the broad meaning which Congress intended that it should have when granting an exemption to the retail trades.

A. The Petitioner's Enterprise as a Whole Constitutes One Retail Establishment.

Three principal factors combine to support the position that the ordinary retail enterprise is one "retail establishment" within the meaning of those words as used in Sec-

[11]The broader scope results from sweeping within the second phrase of coverage, employees having any "necessary" connection with goods that eventually travel across a state line in commerce. *United States* v. *Darby*, 312 U. S. 100. *Kirschbaum* v. *Walling*, 316 U. S. 522. In speaking of the *Darby* case, Mr. Justice Frankfurter has said:

"We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act." *Federal Trade Commission* v. *Bunte Brothers*, 312 U. S. 344, 355.

tion 13(a)(2): (1) the legislative background of the phrase; (2) the practice prevailing among governmental agencies dealing with labor, labor unions and retail merchants, of treating as one labor group all employees of a single retail enterprise (whether sales clerks, stock clerks, record clerks, or other employees); and (3) the practice prevailing among authorities on marketing, miscellaneous governmental agencies and retail merchants, of treating as one business unit all the functions of a retail enterprise (including buying, selling, storing, delivering, accounting and maintenance). In addition to the considerations generally applicable, the facts in the instant case point to the petitioner's business as a single retail establishment.

1. *The Legislative Background.*

In Appendix C (pp. 37-51, *infra*) we have set forth in some detail the legislative history of the retailers exclusion from coverage under the Fair Labor Standards Act. As the legislative history discloses, the exemption stated in Section 13(a)(2) was not in the bills as originally introduced in the Senate and the House of Representatives. That exemption was fostered by pressure from trade associations which represented and were acting in behalf of all types of retailing enterprises. Its sponsors, therefore, obviously intended a broad scope.

A similar breadth was intended by Congress. An examination of the legislative history reveals that there had been repeated statements on the floor of each house that the Act would not reach retailing in any form. But some legislators felt there should be a clear renunciation. To crystallize that sentiment Congressman Celler, on May 24, 1938, in the penultimate stages of the debate in the Third Session of the Seventy-fifth Congress, offered an amendment that none of the wage and hour provisions of the bill "shall be applicable to any retail industry the greater part of whose

selling is in intrastate commerce." Mr. Celler explained that under the amendment's terms "retailing is exempted," 83 Cong. Rec. 7438. After that explanation the Chairman of the House Labor Committee, Mrs. Norton, accepted the amendment for the Committee and the House voted for it. *Ibid.*

When the bill went to Conference, the conferees improved the phraseology of the exemption and gave it its present form. The Administrator has attempted to make much of the slight change in wording that took place at this stage of the proceedings. We submit it is wrong to isolate this particular bit of the legislative history and to deduce from it an intent on the part of Congress which is not warranted when that legislative history is viewed as a whole. Nothing in the legislative background out of which this retail exemption evolved, when considered in its entirety, even remotely suggests a Congressional intention to treat some retailers differently from others. Yet, under the construction which the respondent urges, only the single unit or the very small multi-unit retail businesses can qualify under the exemption in their entirety. To be sure, Mr. Justice Douglas has stated in the *Jacksonville* case that "It is quite clear that the exemption in §13(a)(2) was added to eliminate those retailers located near the state lines and making some interstate sales." 317 U.S. 564 at 571. It will be observed, however, that resort was had to the legislative history of the Act in the *Jacksonville* case to repel an inference there sought to be drawn that, since retailers are excluded by reason of the express provisions of the Act, wholesalers selling only to retailers in intrastate transactions should likewise be excluded. In any event we think that the substitution of the word "establishment" for "industry" is adequately explained by the fact that the word "industry" was a term defined by Section 3(h) to include several separate businesses as a group—in connection with the use of that word in Sections 5 and 8. Without any

change in the amendment, this artificial meaning of the word "industry" in Section 13(a)(2), although clearly inappropriate, would have been required by the statute (*Fox* v. *Standard Oil Co.*, 294 U. S. 87, 95) and therefore, Congress improved the exemption by the substitution of a word, which, except for Section 3(h), was the substantial equivalent of "industry". Moreover, the selection by the conferees of the word "establishment" can be readily understood. That word was one with which retailers were entirely familiar. It was imported into the Fair Labor Standards Act from the National Recovery Administration Code of Fair Competition for the Retail Trade where it had been unmistakably defined not only to refer to "any store or department of a store, shop, stand or other place where a retailer carries on business", but also "to refer to the retailer who carries on business in such establishments."[12]

The conferees must have recognized that the definition in the National Recovery Administration Code of Fair Competition for the Retail Trade would, in the absence of strong reasons to the contrary, be controlling upon the courts. The National Industrial Recovery Act not merely was in *pari materia* with, but was actually the prototype for, the Fair Labor Standards Act. Similar phrases in successive statutes in the same field deserve similar interpretation. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 57 (CCA. 8); *N.L.R.B.* v. *Waumbec Mills*, 114 F. (2d)

[12]The full text of the definition of "establishment" in Section 3 of the Code approved October 21, 1933 (which was amended in respects not now material December 4, 1933, February 12, 1934 and August 23, 1934) as set forth in C. C. H. Federal Trade Regulation Service ¶8558.01 et seq. (104 C. C. H. 8354) follows:

"Sec. 3. Establishment. The term 'establishment' as used herein shall mean any store or *department* of a store, shop, stand or *other place where a retailer carries on business*, other than those places where the principal business is the selling at retail of products not included within the definition of retail trade. *The term is also used herein to refer to the retailer who carries on business in such establishments.*"

226, 232-233. Moreover, Congress must have known that the NRA usage, though not the only possible dictionary meaning, was the preferred meaning.[13] And finally, if a meaning different from the National Recovery Administration Code of Fair Competition for the Retail Trade was intended, Congress would presumably have said so in no uncertain terms at the same time it was giving explicit definitions in Section 3 of the Act of so many other terms.

2. *Employees of concerns such as the petitioner's, whether working in the retail outlets, the warehouse, or any other building operated by the retailing enterprise, are commonly treated and considered as one labor group.*

If analogies are to be examined to assist in determining the scope intended by Congress for Section 13(a)(2) of the Act, we think the field of labor offers the most pertinent ground of inquiry. In that field it is clear that governmental agencies, labor unions and employers customarily regard as one group all retail employees (whether working in a retail outlet, a warehouse or other building) who work for the same employer.

A common instance of this inclusive coverage is to be found in the administrative decisions under collective bargaining statutes such as the national and state labor relations acts. Under both the national[14] and the comple-

---

[13] Dictionaries define "establishment" as used in this sense as meaning either the staff of employees as a whole or a place of business run by that staff. Century Dictionary & Cyclopedia: "An organized * * * business concern and everything connected with it, as servants, employees, etc. * * *" Webster's New International Dictionary (2d ed.): "The place where one is permanently fixed for * * * business; also * * * place of business with its fixtures and organized staff * * *." Oxford English Dictionary: "An organized staff of employees or servants, often including, and sometimes limited to, the building in which they are located."

[14] *Montgomery Ward & Co. Inc.* (Chicago) 56 N.L.R.B. No. 42 Case No. 13—R-2374 (May 2, 1944) [CCH Labor Law Service, ¶6487].

mentary state [15] statutes, workers in one employer's retail outlets, warehouses and central buildings have often been grouped together in what the statutes call a single "appropriate unit". In at least two strongly analogous situations arising under state unemployment compensation statutes, the several units of a single business have been treated as one "establishment". *Spielman* v. *Industrial Commission*, 236 Wis. 240, 295 N.W. 1; *Chrysler Corporation* v. *Smith*, 297 Mich. 438, 298 N.W. 87.

Another instance of administrative consolidation, peculiarly apposite here, is to be found in the operation of state minimum wage orders. The very earliest [16] state minimum wage order antedating *Adkins* v. *Children's Hospital*, 261 U.S. 525, as well as those of more recent vintage [17] tend to

---

[15] *In re Thayer McNeil Co.* Mass. L.R. Comm. Case No. CR 465 (1941), 9 L.R.R. Manual 387; In *re Hearn Dept. Stores, Inc.* N.Y. S.L.R.B. May 21, 1938. 2 L.R.R. Manual 569; *In re Keller Bros. Meat Products Co.* N.Y. S.L.R.B.—Case No. WE-204-7940, (1940), 7 L.R.R. Manual 255; *In re Stern Bros.* N.Y. S.L.R.B. Sept. 27, 1940 [C.C.H. Labor Law Service ¶42,096]; Cf. *Matter of Finlay-Straus, Inc.* (N.Y.) S.L.R.B., commented on in N. Y. State Labor Relations Board Report for the period from July 1, 1937 to December 31, 1939. It was there said (pp. 163-164);

"Where a business establishment is departmentalized, the degree to which the departments are interdependent and the extent of functional integration among the employees involved must be considered in determing the appropriate bargaining unit. Where the departments have been shown to be interdependent so that one could not operate without the other the Board has included all within a single unit. Thus in *Matter of Finlay-Straus, Inc.* the Board refused to place office and store employees of a retail chain into separate units, since the evidence showed that—'the business of the company was highly integrated, that the work in the office was a necessary part of the work in the stores, that a stoppage in the stores would seriously affect the work of the office, and that a cessation of the functioning of the office would necessitate a closing down of the store' ".

[16] Com. of Mass., Minimum Wage Commission, Bulletin No. 6, *Wages of Women in Retail Stores in Massachusetts* (1915), p. 17.

[17] U. S. Dept. of Labor, Women's Bureau, Bulletin No. 167, *State Minimum Wage Laws and Orders* (1939); *Ibid., Supplement;* U. S.

include under a single classification retail sales clerks, retail stock clerks and retail record clerks, regardless of the building where they work, provided their employer is a retail merchant.

A similar theory of inclusiveness is apparent from job classifications prepared by and vocational services furnished through United States Employment Service [18] and the National Vocational Guidance Association.[19]

Dept. of Labor, Women's Bureau, Bulletin No. 137, *Summary of State Hour Laws for Women and Minimum Wage Rates* (1936); New York Dept. of Labor, *Minimum Wage Order No. 3*, Dec. 16, 1932, which recites its coverage in these terms:

"Mercantile, i. e. work in establishments operated for the purpose of trade in the purchase or sale of any goods or merchandise, including the sales force, wrapping force, auditing or checking force, the shippers in the mail-order department, the receiving, marking, and stockroom employees and all other women, except those performing office duties solely."

Oklahoma Dept. of Labor, Minimum Wage Order No. 3, May 1, 1938, which recites its coverage in these terms:

"Retail mercantile, i.e. selling of merchandise to the consumer and not for the purpose of resale in any form; servicing, purchase, or sale of any goods, wares or merchandise; includes the sales, wrapping, auditing, or checking force, shippers in the mail-order department, and outside delivery men."

See also New Hampshire Bureau of Labor, *Mandatory Order No. 5*, Jan. 6, 1941; Massachusetts, Dep't of Labor, *Minimum Wage Commission, Directory Order No. 26*, Oct. 20, 1944; Oregon Dept. of Labor, *Wage and Hour Commission Order No. 8*, July 22, 1941; Montana *Rev. Code* (1935) §3073.1 et seq; Colorado *Stat. Anno.* (1935), 1939 *Cum. Supp.* c. 58, §§71-73, interpreted by Op. of Col. Atty. Gen., Sept. 9, 1937.

[18] U.S. Dept. of Labor, U.S. Employment Service, Job *Descriptions for the Retail Trade* (1938). This informative study with its careful introduction and classification shows that governmental experts having no litigation in view take as we do the position that a retail enterprise normally involves the very type of employees whose occupations are here at issue. Significantly this publication emphasizes the probabilities of transfer from one type of retail job to another, so that the interlocking pattern becomes more evident.

[19] The National Vocational Guidance Association and the United States Employment Service, study prepared under supervision of

Likewise in their general studies of labor conditions[20] and in their periodic statistical reports of wages, hours, volume of employment and kindred matters[21] both the United States and the State Departments of Labor group together all retail workers employed by companies such as the appellant.

Recognition by governmental agencies of the identity of interest among retail sales clerks, retail stock clerks and retail record clerks is matched by a similar recognition on the part of labor unions. There are in the retail field two outstanding labor organizations, the Retail Clerks' International Protective Association (affiliated with the American Federation of Labor) and the United Wholesale and Retail Employees of America (affiliated with the Congress of Industrial Organization), each of which embraces in its jurisdiction, and frequently in the same local chapter, retail sales clerks, retail stock clerks and retail record clerks in different buildings.[22]

Dorothea deSchweinitz, *Occupations in Retail Stores* (1937). See particularly ch. VIII, p. 201 et seq. and Table 16, p. 401.

[20] U.S. Dept. of Labor, Women's Bureau, Bulletin No. 125, *Employment Conditions in Department Stores* 1932-1933 (1936); Com. of Pennsylvania, Dept. of Labor and Industry, Special Bulletin No. 13, *The Personnel Policies of Pennsylvania Department Stores.* Compare Mary La Dame, *The Filene Store* (Russell Sage Foundation, 1940) p.75.

[21] U.S. Dept. of Labor, Bureau of Labor Statistics, *passim.* (See, as illustrative, *Monthly Labor Review,* Vol. 52, p. 248 (January 1941). At p. 250 it is stated that "The indexes for retail trade have been adjusted to conform in general with the 1935 Census of Retail Distribution.") Com. of Mass., Dept. of Labor and Industries, Pub. Doc. No. 15, Labor Bulletin No. 181, *Time Rates of Wages and Hours of Labor in Massachusetts* 1939, p. 41 (classifying department store and furniture store warehouse employees as "retail store employees").

[22] U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 618, *Handbook of American Trade Unions* (1936 ed.), p. 287. (It is there stated that the Retail Clerks International Protective Association admits "all persons employed in mercantile or mail-order establishments who are actively engaged in handling or selling mer-

Finally a retail merchant usually applies to workers throughout his enterprise a common labor policy.[23] A retail merchant customarily uses one personnel office to hire retail store clerks, retail stock clerks and retail record clerks, whether the work performed by these employees is in a retail outlet or a warehouse.[24] The retail merchant applies to all workers uniform provisions with respect to vacations, sick leave, and privileges peculiar to the retail industry, such as the significant permission to buy merchandise at an employee's special discount at any of his retail outlets.[25] Such a merchant frequently shifts for part of a day, or some other temporary interval, workers from one branch to another, and he arranges promotions from one

---

chandise''). Com. Mass., Dept. of Labor and Industries, Labor Bulletin No. 182, *Thirty-Ninth Annual Directory of Labor Organizations in Massachusetts.* See *Occupations in Retail Stores, supra,* p. 88.

[23] Compare the statement of Nystrom, P. H., *Economics of Retailing* (3rd ed. 1930), Vol. II, pp. 12-13. ''The functions of a retail store, whether big or small, are approximately the same. The essential difference in the performance of these functions (13) in large or small stores is that in a large store there is usually a fine division of labor, and each function is performed by separate people, whereas in a small store many of the functions are combined and performed as the duties of single individuals.'' See his Table 22, Vol. II, p. 270.

[24] It is perhaps not commonly realized how large a percentage of the employees of even a medium sized retail establishment of which the petitioner furnishes a fair example are engaged in non-selling operations. Prof. Nystrom, supra, Vol. II, pp. 269-271, says that when sales reach an annual volume of two million dollars usually one-half of the employees are in non-selling operation, and as the sales increase the percentage of non-selling employees rises. To the same effect see Federal Reserve Bank of Boston, *Bulletin,* Dec. 1, 1925.

[25] In general, see the magazine *''Occupations,''* Vol. 18, p. 509 et seq., *''Handling Retail Personnel.''* As to employee discounts, etc., see Converse, P.D., *Employment, Wages and Labor Relations in Marketing,* Annals, Vol. 209, pp. 149, 154 (1940).

group to another,[26] and with this in mind "some of the largest retail stores in the country . . . conduct training for such non-selling groups as telephone operators, delivery men, inspectors and wrappers, elevator operators, section managers, assistant buyers, adjustment bureau clerks, stock room employees, office employees, etc." [27]

Thus, from every angle, the governmental, the union, and the employer, retail employees working for one employer are treated as being in one retail establishment, although they may work under different roofs. It can hardly be supposed that, in the absence of the clearest direction to the contrary, Congress intended to split this traditional unity.

3. *In matters other than labor policy, the divisions of an enterprise like the petitioner's are treated collectively as one "retail establishment".*

Authorities on distribution regard a retail enterprise as unitary despite the fact that the storage or office clerical work is done under another roof than the selling. Such authorities recognize that every retailer requires storage and clerical records and delivery.[28] From their viewpoint

[26] See the illuminating comments on promotions from one particular job to another set forth in the U.S. Dept. of Labor study already cited, *Job Descriptions for the Retail Trade.*

[27] Nystrom, P.H., *Economics of Retailing* (3rd ed. 1930), Vol. II, pp. 407-408; U. S. Bureau of Education, Bulletin No. 9, *Department Store Education* (1917).

[28] Craig, D.R. and Gabler, W. K., *The Competitive Struggle for Market Control*, The Annals, Vol. 209, pp. 84, 87-90 (1940). The Twentieth Century Fund, *Does Distribution Cost Too Much* (N.Y. 1939) (pp. 70-71) ("A retail store • • • stores the article until the consumer calls for it, sells it in the amount and form desired by the consumer and often delivers it to his home. • • • (p. 71) Sometimes, too, the retail store engages in processing • • • it may freeze ice cream, or grind coffee or fit and alter clothes bought by the customer. If it deals in coal, it may sell not only to homes but to factories, thus becoming to some extent an intermediary distributor.") Nystrom, supra, Vol. II, pp. 6, 13. Lew Hahn, *The Mer-*

if the business is to be regarded as in any way to be divided for analysis, the division is not according to physical location, but according to functions such as (1) merchandising, (2) superintendence, (3) publicity, and (4) finance accounting and control.[29]

The Federal Trade Commission, with the object of aiding retail merchants to improve their accounting methods by a simple system of accounts,[30] expressly advised retailers to include in a single statement with expenses of their retail outlets, expenses of their retail warehouse properties,[31] the salaries and wages of their delivery forces,[32] and other items not here material. And similar inclusiveness is regarded as appropriate by other authorities.[33]

In their periodical reports of department store stocks, the Federal Reserve Bulletins lump together stocks which department stores keep in retail outlets and stocks they keep in their own warehouses.[34]

It has been suggested [35] that because under census practice the Department of Commerce treats each physically

---

chants Manual (Published by National Retail Dry Goods Association, 1924), pp. 83-86. Filene, L., *Next Steps Forward in Retailing* (1937), p. 98.

[29] Nystrom, *supra*, Vol. II, pp. 19-20. See the more minute division in Craig and Gabler, *supra*. Compare Nystrom, P.H., *Retail Trade*, Encyclopedia Social Sciences, Vol. 13, pp. 346, 348-350.

[30] Federal Trade Commission, Report to 64th Cong., 1st Sess., Doc. No. 1355, *A System of Accounts for Retail Merchants* (July 15, 1916). Prefatory note by Chairman E. H. Hurley.

[31] Ibid., p. 11, Par. 8, p. 19.

[32] Ibid., p. 17.

[33] Harvard School of Business Administration, *Operating Results of Department and Specialty Stores in 1939;* The Twentieth Century Fund, *Does Distribution Cost Too Much (1939)*, p. 225.

[34] See, for example, Fed. Res. Bulletin, Vol. 24, p. 232, Vol. 25, p. 1128.

[35] See, opinion of court below, R-28, Footnote 2. [144 F. 2d 102, 105].

segregated part of a retail enterprise as a different "establishment", a reason exists for similar treatment of a retail enterprise under Section 13(a)(2). But the treatment in the former case is premised on the necessity of giving prime consideration to the geographical facts, while that consideration is of no importance in the matter at hand. Moreover, this practice in a single field seems to us not determinative particularly since the Bureau of the Census like the Central Statistical Board, treats the warehouse of every type of retailer as a "retail establishment".[36]

The Administrator may also seek some support from state chain store tax statutes which *sometimes* treat a retailer's warehouse as not a "retail establishment". But on this point there is a diversity of local views, some states regarding a retail warehouse as a "mercantile establishment" [37] and others regarding it differently, depending on whether the owner is a department store or national chain system.[38]

4. *The facts in the instant case require that all the petitioner's stores, together with its central office and warehouse be treated as a single "retail establishment".*

To the extent that the interpretation of Section 13(a)(2) may depend on specific facts,[39] the petitioner's business enterprise qualifies as one that must be considered a single "retail establishment".

---

[36]U. S. Dept. of Commerce, Census of Business, 1935, *Retail Distribution* Vol. I. *passim*. Central Statistical Board, *Standard Industrial Classifications*, published by the executive office of the President, Bureau of the Budget, Division of Statistical standards (1940)

[37]See *Liggett Co.* v. *Lee*, 288 U.S. 517, 531, line 18, construing Florida Laws of 1931, c. 15624, §2; *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95, line 1-3, construing W. Va. Acts of 1933, c. 36 §8.

[38]See *Great Atlantic & Pacific Tea Co.* v. *Morrisset*, 58 F. (2d) 991 aff. per curiam 284 U. S. 584, construing Virginia Acts of 1928, c. 45.

[39]See *White* v. *Jacobs Pharmacy*, 47 F. Supp. 689; *Walling* v. *Block*, 139 F. (2d) 266, cert. den. 321 U. S. 785.

The petitioner's central office and warehouse is the executive and record center, as well as the supply base for an integrated organization. All the retail outlets are centered in a relatively compact area near the City of Springfield, Massachusetts. The activities now carried on in the central office and warehouse are identical with what would, of necessity, otherwise be performed in the individual stores on a much smaller scale and at greatly increased cost. The centralization of stock clerks and record clerks is for convenience and economy of operation. Decisions as to how merchandise shall be divided among the stores are made by division superintendents. Accounting, payroll and inventory records are integrated, and while in accordance with sensible business practice, separate accounts for each store are maintained, the transfers of goods among the stores are frequent. Moreover, the business is conducted on essentially simple functional lines. There is no indication that proportionately greater charges for transportation are made against the stores farthest from the central warehouse or that the petitioner maintains any other similar intra-company accounts such as might justifiably be expected in a less integrated business.

It is clear, we submit, that in managerial and merchandising policy, the petitioner's enterprise is a unit and that the results of the Administrator's interpretation of Section 13(a)(2) is to split into two, that which is designed to be and is, but one.

B. Even If The Petitioner's Enterprise As A Whole Does Not Constitute One Retail Establishment, The Petitioner's Office And Warehouse Employees Are Engaged In A "Retail Establishment".

There are two propositions which the respondent must successfully counter if the judgment below is to be affirmed. We have thus far been concerned only with the first, namely,

the contention that the petitioner's entire enterprise is a retail establishment of which the central office and warehouse building is but a part. We regard legislative history, labor law, business practice, and the plain facts of the matter as against the view that each physically segregated unit of the petitioner's business must be considered separately when determining the applicability of the retail exemption. The second proposition is that the petitioner's central office and warehouse building is a *retail* establishment. We submit that even though the central building in question is treated as a separate establishment, it is a "retail establishment" and therefore Section 13(a)(2) is applicable to the petitioner's central office and warehouse employees who work there.

Many of the considerations and authorities marshalled in support of our argument on the first proposition are equally pertinent here. A central office and warehouse building is an essential part of the retail business which Congress intended to exempt and which was asserted to have been exempted. (See pp. 13-17, *supra*, and Appendix C.) Employees in such a building are often grouped with employees in retail outlets — in a single appropriate unit for collective bargaining; in a single state minimum wage order; in vocational job classifications; in governmental studies of labor conditions in the retail industry; in labor unions; in company personnel policies respecting working conditions, transfers, training, special privileges and the like (pp. 17-22, *supra*). Moreover as previously stated (pp. 22-25, *supra*) authorities on distribution, accountants and statistical agencies regard a retailer's central building as a retail establishment and a substantial number of tax statutes do likewise. Even the Bureau of the Census, upon which the respondent has relied, would regard the petitioner's central office and warehouse building in Springfield, Massachusetts as a "retail establishment". (If the respondent is to resort to the census to break up the peti-

tioner's business, he should at least label the pieces in the same way the census does.)[40] There is other statutory, judicial and administrative material not cited above to which reference may be made as indicating that a central office and warehouse building is a retail establishment.[41]

It may, however, be contended that the words of the statute themselves prevent the construction for which we contend; that if a central office and warehouse building is a retail establishment, it is not one that sells and so it cannot be maintained that the greater part of its "selling or servicing is in intrastate commerce". To such a contention, there

---

[40] U.S. Dept. of Commerce, Census of Business (1935), Retail Distribution, Vol. I, pp. 1-26, 1-27. *Ibid:* Special Reports, *Retail Operating Expense,* pp. 7 and 9. See also the Central Statistical Board, *Standard Industrial Classifications, supra.*

[41] (a) In the New York Labor Law, where the term frequently occurs, (see e.g. N.Y. Labor Law, §130, par. 1, §161, par. 1, §180, §180a, §181, §375, §390 and §391.) means "a place where * * * goods are offered for sale * * * and *includes a building * * * occupied in connection with such establishment.*" (N.Y. Labor Law of 1897, c. 415, §2, now Labor Law, §2, par. 11.) In interpreting this section the Attorney General of New York, in an opinion addressed to Hon. Frances Perkins, ruled that "buildings where goods are stored for sale are mercantile establishments though they are not the buildings where orders are taken." (1926 Op. N.Y. Atty. Gen. 108)

(b) In Massachusetts labor law, where the term also frequently recurs, (Mass. G.L. (Ter. Ed.) c. 149, §§48, 55, 56, 58, 60, 62, 66, 67, 86, 92, 95, 103, 113, 139, 152, 158A.) "mercantile establishment" includes any "premises used for the purposes of trade in the *purchase or sale* * * * of any goods." (Mass. Acts of 1887, c. 103, §5, incorporated in Mass. G.L. (Ter. Ed.) c. 149, §1.)

(c) Under the Oklahoma Workmen's Compensation Act, 85 Okla. St. Ann. §2, a separate warehouse of a retail drug company was held to be a retail establishment not a "wholesale mercantile establishment" or "transfer and storage business." *Veazey Drug Co.* v. *Bruza,* 169 Okla. 418, 37 P. (2d) 294.

(d) Under the Illinois Child Labor Act a coal yard where coal was stored for sale was held to be a "mercantile establishment." *Purtell* v. *Philadelphia & Reading Coal & Iron Co.,* 167 Ill. App. 125, 147; see s.c. 256 Ill. 110, 99 N.E. 899, 902.

is a threefold answer. First, the Act broadly defines "sale" or "sell" so that it "includes any consignment for sale, shipment for sale or other disposition."[42] The fact that no sales occur at the central building is immaterial, since shipments for sale and other disposition do occur. In the next place, it is doubtful whether the phrase has the special restrictive application suggested. We believe that Congress did not mean that a particular retail place of business had to sell in order to be "a retail establishment", but that it meant that if a particular retail place of business *did* sell at all, the exemption would apply only if 51% of the sales made were in intrastate commerce. Furthermore, it is to be noted that Congress used the word "establishment" instead of the word "store" presumably to include places where there are no sales.

A second contention may be offered in support of the respondent's position, namely, that a retailer's warehouse is so like a wholesaler's warehouse as to be classified with it rather than as a retail establishment. In addition to its being contrary to the record in the instant case, this contention is against sound economic reasoning and judicial precedent.

On the record here the petitioner does not sell from its central building to other retail merchants, or to institutions or to governments. This building is merely a place for stocking merchandise and for quartering executives, accounting, payroll, inventory, credit and like clerks. The only sales made by the petitioner's enterprise are made to the ultimate consumer at retail and in small quantities.[43]

---

[42]Section 3(k)

[43]"The words retail" and "wholesale" are commonly defined. not with primary emphasis upon difference between sales to an ultimate consumer and sales to one who intends to resell, but rather with reference to difference between selling in small quantities and selling in large quantities or in bulk." *Petros* v. *Sup't & Insp. of Buildings of City of Lynn*, 306 Mass. 368, 371, 28 N.E. (2d) 233.

Moreover, economic learning does not teach that this type of central building is analogous to a wholesaler's warehouse. The fact that both may buy in quantity and stock goods is not significant. These similarities are of less consequence than the dissimilarities. The retailer does not, but the wholesaler does, engage in quantity sales, assume for another company "the risk of price changes and physical deterioration"[44], and act as a middleman between the manufacturer and the ultimate seller, for each of which he performs important services.[45]

Finally, the distinction between the two types of warehouses has been repeatedly drawn by the courts. It has been pointed out in a ruling[46] in which all the Justices[47] of this Court concurred that:

> "Chain stores do not sell at wholesale. What they store, if they warehouse any goods in the state of Florida, is for the purpose of retail sale at their shops. On the other hand, goods held by a wholesaler are stored for sale to retail establishments to be sold by the latter. What has been said with respect to difference in methods and operation of the two kinds of warehouses applies in this instance. The diverse purposes of the storage and the difference in the nature of the business conducted are sufficient to justify a different classification of the two sorts of warehouses for taxation."

And other decisions have emphasized that the retail character of a business is determined not by the nature of its purchases but by the nature of its sales.[48]

---

[44] Converse, P.D. and Huegy, H.W., *The Elements of Marketing* (1940), p. 109.

[45] Beckman, T.N., *Wholesaling* (1926), Chap. II, "Functions of the Wholesaler."

[46] *Liggett Co.* v. *Lee*, 288 U.S. 517, 537-538.

[47] See Cardozo J., dissenting, in *Liggett Co.* v. *Lee*, 288 U.S. 517, 583, line 11.

[48] *Cook* v. *Marshall County*, 196 U.S. 261, 274-275; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, 47, 48 (C.C.A. 2); *State* v. *Cohen*, 133 Me. 293, 177 Atl. 403, 405; *Petros* v. *Sup't & Insp. of Buildings of City of Lynn*, 306 Mass. 368, 28 N.E. 2d 233.

C. If Under The Fair Labor Standards Act, Employees Who Work In A Physically Segregated Central Office And Warehouse Building Which Functions As An Integral Part Of A Retail Business Are Regarded Differently From Employees Working In Other Locations, Anomalous And Confusing Results Will Follow.

If the phrase "retail establishment" were to be given the narrow scope proposed by the Administrator, there would be absurd consequences.

First, competing retail merchants would have different labor standards. The practical importance of this fact is brought into high relief when considered against the background of this instant case. The petitioner's business "is very competitive and wages are the largest item of cost outside the cost of merchandise." (R. 12) But under the Administrator's view, the Act would not apply to any part of even the largest retail enterprise under one roof, competing with the petitioner, yet it would apply to the petitioner. And similarly, under the construction of Section 13(a)(2), which the respondent urges, the Act would apply to parts of the small enterprise which had but two outlets,[49] or one outlet and one warehouse, or perhaps even one outlet connected by a passage-way with a storeroom.

There is an apparent similarity between the duties of employees in a warehouse attached to a wholesale business and the duties of employees who work in a warehouse that functions as an integral part of a retail business. The Administrator does not seek to go beneath the surface and fails to distinguish between these two groups of employees. Indeed, he has regularly made great point of the fact that a retail warehouse is in competition with a wholesale warehouse. We take the view that the fundamental differences

[49] It has even been suggested that the physically segregated store is not wholly exempt if it houses a receiving and reshipping room that services other branches. See W & H Opinion Letter, April 24, 1941 [C.C.H. Lab. Law Service ¶ 25, 551.54].

(see pp. 27, 28, *supra*) between wholesale and retail businesses dwarf the superficial and apparent similarities between the duties of employees and we urge that any rule for determining the status of employees in a retailer's warehouse under the Fair Labor Standards Act should not be developed on the false premise that the two groups of employees work for competing businesses. Inherent in the position taken by the Administrator is the erroneous assumption that a wholesaler's warehouse which supplies local merchants is subject to the Act. *Cf. Higgins* v. *Carr Brothers Co.*, 317 U.S. 572. The competition for the petitioner issues from other retail grocery stores, not from wholesalers. The principal competitors of retail merchants invariably are other retail merchants and not wholesalers. To subject to the Act some merchants and not others because of the accident of where they store their goods, creates a ridiculous disequilibrium in the competitive situation.

Second, within the same enterprise, employees of the same employer doing identical tasks would be subject to different labor laws. There are many identical tasks in the retail outlets and in the central building. Without attempting an exhaustive survey we suggest that receivers, stock men, taggers, maintenance personnel do virtually the same work irrespective of whether their place of employment happens to be a warehouse or a store. It will promote disharmony among workers and business confusion to have different labor standards. And this chaos will be aggravated in the case of persons who are temporarily or permanently transferred from a branch which, under the Administrator's view, is regarded as covered to one which is regarded as exempt.

In addition to labor confusion and bookkeeping confusion, there may be judicial confusion. The unhappy experience of the federal courts with the Second Federal Employer's

Liability Act[50] before the 1939 Amendment[51] is so fresh in the minds of judges[52] and has been the subject of such acid comment[53] as to require no restatement. Surely that unfortunate experience in the railroad industry ought not to be repeated in the more complicated, diversified and far-flung retail industry.

Indeed no one realizes better than the Administrator himself the confusion which results from dividing an industry

---

[50] 35 Stat. 65; U.S.C.Ti. 45, §51.

[51] 53 Stat. 1404; U.S.C. Ti. 45, §51.

[52] Frankfurter & Landis, *The Business of the Supreme Court at October Term* 1931, 46 Harvard Law Review 226, 240-243 (1932).

[53] Schoene, L.P. and Watson, F., *Workmen's Compensation on Interstate Railways*, 47 Harvard Law Review 389 (1934). From this article it will enough to quote the following from pp. 404-405:

"Unloading rails and ties to be used in an interstate track is held to be an activity within the special province of the Federal Government, but it becomes a matter of state concern exclusively if the rails and ties are not to be used in the immediate future. So, too, removing worn rails is interstate commerce. But courts have not been able to reach such unanimous agreement with reference to loading the old rails on cars for the purpose of hauling them away after their removal. Two courts settled the conflict by finding that the old rails had not outlived their usefulness but were to be used again in an interstate track. Another court gratefully noted as controlling the fact that the section-foreman had divided his crew into halves, so that one half removed the rails while the other half carried them away. In the face of distinctions like these, it is not startling to learn that one who repairs a spur track leading to scales on which interstate cars are weighed is engaged in interstate commerce while one who is repairing the scales themselves is not.

"Another task whose character seems to be well settled is that of repairing a bridge over which an interstate track runs. The interstate quality of the activity is held to extend to unloading materials to be used in making such repairs, to hauling materials to the site of the repairs, to riding there to aid in the repairing, and to cooking meals for the workmen. But if the old bridge is beyond repair, removing it is not interstate commerce, nor is working on an abutment for a new bridge to take its place. And if the bridge is so small as to be properly termed a culvert, activity with reference to it cannot be dignified with an interstate character."

into exempt and non-exempt parts. He has been vigilant to include within the Act all employees of an employer engaged in production, whether the individual employee was or was not producing goods. He has said that a production employer would not hire an employee unless he were necessary for production.[54] There the Administrator has taken a common-sense, practical view. We suggest the same sort of realism in dealing with retailers. The part-in-part-out program would work as poorly in retailing as in any producing industry. And retailers, just like producers, take on employees only if they are necessaray to the establishment.

Summarizing, we respectfully submit that whether the petitioner's enterprise be regarded as one or as fifty establishments, the employees who work in its central office and warehouse building are engaged in a "retail establishment" and that the exemption set forth in Section 13(a)(2) of the Fair Labor Standards Act applies to them.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

CHARLES B. RUGG,
Amicus Curiae

WARREN E. CARLEY,
ROPES, GRAY, BEST, COOLIDGE & RUGG,
50 Federal Street,
Boston, Massachusetts,
Of Counsel.

February, 1945.

---

[54]U.S. Dept. of Labor, Wage and Hour Division, Interpretative Bulletin No. 1, par. 5 (Oct. 12, 1938). [Reprinted in 1942 Wage and Hour Manual (*supra*) p. 22].

APPENDIX A.

American Retail Federation

Member Associations

Nineteen National Associations

American National Retail *Jewelers* Association
Cooperative *Food* Distributors of America
Limited Price *Variety* Stores Association
Mail Order Association of America
National Association of Chain *Drug* Stores
National Association of Credit *Jewelers*
National Association of Retail *Clothiers* and *Furnishers*
National Association of Retail *Druggists*
National Association of *Food* Chains
National Association of Retail *Grocers*
National Association of *Music* Merchants
National Council of *Shoe* Chains
National Retail *Dry Goods* Association
National Retail *Farm Equipment* Association
National Retail *Furniture* Association
National Retail *Hardware* Association
National *Shoe* Retailers Association
National *Voluntary Groups* Institute
Retail *Credit* Institute of America

Thirty State Associations

California Retailers Association
Colorado Retailers Association
Delaware Retailers' Council
Georgia Mercantile Association
Illinois Federation of Retail Associations
Associated Retailers of *Indiana*
Associated Retailers of *Iowa,* Inc.
Kentucky Merchants Association
State Merchants Association, Inc. (*Maine*)
Maryland Council of Retail Merchants

Massachusetts Council of Retail Merchants
Michigan Retail Institute
Mississippi Retailers' Association
Missouri Retailers Association
Nevada Retail Merchants Association
New Hampshire Council of Retail Merchants
Retail Merchants Association of *New Jersey*
New York State Council of Retail Merchants, Inc.
North Carolina Merchants Association, Inc.
Ohio State Council of Retail Merchants
Oklahoma Retail Merchants Association
Oregon State Retailers' Council
Pennsylvania Retailers' Association
Rhode Island Retail Association
Retail Merchants Association of *Tennessee*
Retail Merchants Association of *Texas*
Utah State Retailers' Association
Vermont Council of Retail Merchants
Retail Merchants Association of *Virginia*
West Virginia Retailers Association, Inc.

APPENDIX B.

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U.S.C., Sec. 201, et seq.).

Section 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . .

Section 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . .

Section 13 (a). The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . .

APPENDIX C.

Legislative History of Retailer's Exclusion From the Act.

1. *President's Message.*

On May 24, 1937 the President sent a message recommending to the First Session of the Seventy-Fifth Congress national legislation with respect to the wages and hours of certain employees. The message (H. Doc. 255, set out in 81 Cong. Rec. 4960 and 4983 and in S. Rep. No. 884, p. 1, and H. Rep. No. 1452, p. 5) said in part:

"Today, you and I are pledged to take further steps to reduce the lag in the purchasing power of *industrial workers* and to strengthen and stabilize the markets for the farmers' products. • • •

"One of the primary purposes of the formation of our Federal Union was to do away with the trade barriers between the States. To the Congress and not to the States was given the power to regulate commerce among the several States. Congress cannot interfere in local affairs but when goods pass through the channels of commerce from one State to another they become subject to the power of the Congress, and the Congress may exercise that power to recognize and protect the fundamental interests of free labor.

"And so to protect the fundamental interests of free labor and a free people we propose that *only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce.* Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade. • • •

"Although a goodly portion of the goods of American industry move in interstate commerce and will be covered by the legislation which we recommend, *there are many purely local pursuits and services which no Federal legislation can effectively cover.* No State is justified in sitting

idly by and expecting the Federal Government to meet State responsibility for those labor conditions with which the State may effectively deal without fear of unneighborly competition from sister States. *The proposed Federal legislation should be a stimulus and not a hindrance to State action.* • • •

"Legislation can, I hope, be passed at this session of the Congress further to help those *who toil in factory* and on farm."

2. *Original Bill, S. 2475, H. R. 7200.*

On the same day bills S 2475 and H. R. 7200, identical save in two unimportant particulars, were introduced in the Senate and House of Representatives, respectively (81 Cong. Rec. 4961 and 4998). This Bill did not expressly exempt local retailers.

(a) The policy of the proposed Act was declared to be "prohibiting the shipment in interstate commerce of goods produced under substandard labor conditions and • • • the elimination of substandard labor conditions in and directly affecting interstate commerce." (Compare Section 2(b) of the Act).

(b) The basic sections provided for the application to "employees in any occupation in which such employees are engaged in interstate commerce or are engaged in the production of goods which are sold or shipped to a substantial extent in interstate commerce" of (1) statutory minimum wages and maximum hours (Sections 2 (a) (10) and (11) and 4; compare Sections 6 and 7 of the Act) and (2) administrative orders, to be issued industry by industry with the advice of industry committees, prescribing minimum wages and maximum hours (Sections 5 and 14; compare Sections 5 and 8 of the Act).

(c) The Bill also contained various supplementary provisions including sections authorizing the administrative authority to issue wage and hour orders with respect to (1) those engaged in intrastate commerce when those embraced

within the basic sections (summarized in (b) above) are discriminated against or put at a competitive disadvantage (Section 8(a)) or (2) any occupation in which substandard wages and hours of any employer or class of employers (A) tend to lead to labor disputes directly burdening or obstructing interstate commerce, (B) directly affect the movement or price of goods in interstate commerce, or (C) are maintained with the intent to divert or substantially affect the movement or price of goods in interstate commerce (Section 10).

3. *Committee Hearings.*

Joint Hearings were held on the Bill before the Senate Committee on Education and Labor and the House Committee on Labor, beginning June 2, 1937, at which the scope of the Bill was extensively considered.

(1) A memorandum (See Joint Hearings before Senate and House Labor Committee on S. 2475 and H. R. 7200, pp. 54-62) submitted by Robert H. Jackson, then Assistant Attorney General, explaining the scope and judicial precedents for the various provisions, shows that but for the supplementary provisions (see paragraph 2(c) above) local retailers were not included within the purview of the Bill:

(a) "While the *main regulatory features of the bill are thus directly confined to interstate commerce*, the bill recognizes the necessity for protecting employers who produce for interstate markets from competition of overreaching employers engaged only in local trade" (Joint Hearings, *supra*, p. 59) and "further regulates conditions of employment by requiring the maintenance of fair labor standards in particular situations directly affecting interstate commerce." (*Ibid.*, p. 56)

"While the bill closes the channels of interstate commerce to goods produced under unfair labor conditions, the *bill does not attempt to cover purely local pursuits or intrastate service trades.*" (*Ibid.*, p. 56)

(b) The precedents upon which the regulation of working conditions of employees "engaged in interstate commerce" (Section 7(c)) were stated to be based are: "*Wilson* v. *New*, 243 U. S. 332; *Virginia Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515; *Washington, Virginia and Maryland Coach Co.*, v. *National Labor Relations Board*, 301 U. S. 142 (Joint Hearings, *supra*, p. 59).

The precedents cited for the provisions designed to protect interstate commerce from unfair competition by local commerce (Section 8(a)) are: *Shreveport Rate Cases*, 234 U. S. 342; *Railroad Commission* v. *Chicago, B. & Q. R. R.*, 257 U. S. 563 (*Ibid.*, pp. 51-59).

And the precedents cited for the various subdivisions of Section 10 (set out in paragraph 2(c) (2) above) in addition to the Wagner Act cases, are respectively: (A) and (C) *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; and (B) *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (*Ibid.*, pp. 52-53, 60).

(2) In discussing the scope of the Bill, Mr. Jackson also brought out at several points that the Bill was directed at the producer and not local retail enterprises, and that a retailer, even though making his purchases in interstate commerce, would be covered only (1) where he was located near, and sold his goods by delivery across, a State line and (2) where by his labor practices he affected interstate commerce through competition with those engaged in such commerce:

(a) Thus,

"it is *not intended by this bill to affect the retail trades or the service trades.* It is *intended to catch the unfair labor practices at the point of production* • • •. They must be fair goods if they move across the State line." (Joint Hearings, *supra*, pp. 39-40.)

Again: "The purpose of the law is to apply to (sic.) it to the *producer rather than to the seller.*" (*Ibid.*, p. 71.)

(b) In response to the question whether the Bill applied to "retail stores of the chain-store variety, that is, those stores that sell in the retail market but who move goods across State lines," he said:

"You would have to establish just that they were engaged in interstate commerce to a substantial extent in themselves, or you would have to establish the competitive feature I have mentioned [between intrastate and interstate commerce]. *It is hard to conceive of the latter situation arising whereby local businesses would be subject to this law.*"

And to the further question whether the Bill applied to such an organization as the A. & P., National Grocery or Woolworth stores which "certainly are engaged in interstate commerce," he replied:

"Before you would be able to reach a situation of that kind you would have to find that the practices did, to a substantial degree, affect interstate commerce." (Joint Hearings, *supra*, pp. 24-25).

(c) To a request by Chairman Black for an explanation "under just what circumstances and under what circumstances only, it would be possible for the regulation of *retail establishments* and small business enterprises to come under this bill," Mr. Jackson said:

"There are *only two ways in which a retailer* • • • *would be affected* • • •. One would be the *retailer who is located close to a State line* and sold his goods by delivery across a State line, and the other would be the case of a *local retailer, who by his labor practices and standards was able to affect the interstate movement of goods.* In other words, if a merchant in interstate commerce such as Sears, Roebuck should be able to convince the Board that a local merchant's labor standards were enabling him to compete unfairly with Sears, Roebuck, then that local merchant might be required to adopt fair standards. Of course, while that is possible legally, it is very far fetched as a practical

proposition. Practically, the situation in which a local merchant might be affected would be if he were moving his goods in the course of delivery across the State line to a substantial extent so that he were engaging in interstate commerce; but, generally speaking, *the policy of the bill is not to include the service trades and small businesses and the retailing enterprises* • • •. As a practical proposition, *the bill does not affect the retail trades.*"

He acknowledged as "a correct statement of the purpose of the bill" the statement by Chairman Black that "the bill shows on its face, • • • from beginning to end, that it is intended to provide standards for those business units that are actually engaged in and substantially and materially affecting interstate commerce • • •, leaving to the States and the local communities themselves, the power of regulating the small business units that affect the local community only" (Joint Hearings, *supra,* pp. 35-36).

(d) As to the converse case, interference with the local merchant by mail-order houses like Sears, Roebuck which also maintained a chain of stores, he stated that the local merchant could complain "in so far as their mail-order business is concerned," as that was "interstate commerce," but it did not necessarily follow that the local store was "in interstate commerce," though it would be where it is "an agency for taking orders to be transmitted" out of state for filling. Where complaint could be made, he explained, the basis would have to be Sears, Roebuck's interstate business and not the effect on the local merchant's business, who "is not engaged in interstate commerce," even though "all of the country merchant's stock were received in interstate commerce [and] he is constantly selling from that stock and replenishing it through interstate-commerce channels" (Joint Hearings, *supra,* pp. 36-37).

(3) Mr. Leon Henderson, in estimating the number of employees which the proposed Act will cover, included those engaged in "industry" but excludes those engaged in "distribution and service" (Joint Hearings, *supra,* p. 159).

4. *Senate Committee Bill and Report and Debate in Senate.*

The Senate Labor Committee reported out S. 2475 with substantial amendments together with Senate Report No. 884 (75th Cong. 1st Sess.) on July 8, 1937 (81 Cong. Rec. 6894). After debate, the Senate passed the Bill on July 31, 1937 (81 Cong. Rec. 7957). The Bill, as amended, the Committee Report and the debates show clearly that local retailers were excluded from the scope of the proposed Act even in those cases where they would have been covered by the original Bill.

(1) The Bill as reported out by the Committee was amended in the following respects:

(a) An exemption was given with respect to "any person employed in a bona fide * * * local retailing capacity (as * * * defined and delimited by regulations of the Board)" by means of exclusion from the definition of "employee" (Section 2(a)(7)).

(b) The scope of the Bill was restricted to regulating the wages and hours of employees "engaged *in* interstate commerce or *in the production of goods intended for*" interstate commerce (Sections 4 and 7), with the one exception of the case of the wages and hours of employees engaged in "the production of goods in one State" which are sold locally in competition with goods "produced in another State and sold or transported in interstate commerce" (Section 8(a)).

(2) The Committee Report stated:

"The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the nation in so far as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. *It leaves to state and local communities their own responsibilities concerning those local service and*

other business trades that do not substantially influence the stream of interstate commerce."

The Report then states the reason for the "local retailing capacity" exemption:

"For example the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near state lines, and solely on account of such location, actually serves a wholly local community trade within two states" (Sen. Rep. No. 884, *supra*, p. 5).

(3) The debates confirm the understanding that local retailers were not included within the scope of the Bill and show the reasons for that exclusion:

(a) In introducing consideration of the Bill, Senator Black, Chairman of the Senate Committee on Labor, said:

"It provides a method of obtaining the objective of minimum wages and maximum working hours in industries throughout the Nation which engage in the transportation of their goods in interstate commerce. *It is not intended to, and does not, attempt to provide by Federal legislation the fixing of minimum wages and maximum hours of employment in all the varied peculiarly local business units of the Nation.* * * * So the bill, in so far as it relates to maximum hours of employment and minimum wages, is limited, except to the small extent I have heretofore indicated (Section 8(a), summarized above in paragraph 4(1)(b)), to goods which are actually manufactured for transportation and are transported in interstate commerce. *We therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various service employments throughout the Nation*" (81 Cong. Rec. 7648). The reason for this limitation, he said, was twofold:

Firstly, because the Bill "rests squarely upon the interstate commerce clause" of the Constitution, and, secondly, because it was the "prevailing," if not "unanimous," sentiment of the Committee that

"businesses of a purely local type which serve a particular local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the states in which the business units operate." (81 Cong. Rec. 7648).

And, he continued:

"With reference, however, to the regulations covering business units that ship their goods in interstate commerce, the bill is offered with the belief that it is impossible today to expect that any one local community can tend to bring about the proper regulation of the business of producing such goods to be scattered throughout the entire 48 States" (81 Cong. Rec. 7648).

(b) In response to a criticism by Senator George that, "All retail clerks and helpers in retail establishments * * * are out of the bill," Senator Black responded:

"May I ask the Senator whether he believes that under the definitions which have been given of interstate commerce, it would be possible for the Congress to regulate the hours of those working in the retail stores throughout the country?" (81 Cong. Rec. 7785).

(c) See also: Senator Black stating that the Bill differed from the N. R. A. in applying "only to interstate industries," with the exception of Section 8(a), that the number of employees estimated to be covered did not include those engaged in distribution and service, and that "Federal Standards will * * * stimulate State legislation for local industry" (81 Cong. Rec. 7745, 7746); the use of "establishment" to mean a business organization by Senator Walsh (*Ibid.*, pp. 7800-7801) and Senator Black (*Ibid.*, p. 7867).

5. *House Committee Bills and Reports and Debate in House.*

(1) The House Labor Committee reported out S. 2475 in substantially the form passed by the Senate together

with H. Rep. No. 1452 (75th Cong., 1st Sess.) on August 6, 1937 (81 Cong. Rec. 8478), but the Bill did not come to a vote in the First Session.

(2) In the Second Session, the House debated the Bill and recommitted it to the House Committee on Labor on December 17, 1937 (82 Cong. Rec. 1834-1835). During the debate:

(a) Representative Norton, Chairman of the House Labor Committee, stated in the course of a long comparison of the proposed law with the N. R. A., that this Bill leaves "local business" to "the protection of the laws of the several States" and "would affect only those agencies of business which are now subject to Federal regulation" (82 Cong. Rec. 1392); and enumerated 23 States with minimum-wage laws which were studied by the Committee, calling attention to the District of Columbia law under which a "retail-trades" wage order was stated to have been issued a short while before (*Ibid.*, p. 1789).

(b) See also statements with respect to those not covered by the Bill: "thousands of workers in department stores and 5 and 10 cent stores and other purely intrastate businesses" (Representative Hartley, 82 Cong. Rec. 1394); "employees in retail establishments, including the big department and chain stores, as well as the small independent ones" (Representative Mapes, *Ibid.*, p. 1399); and statement by Representative McLean in discussing the analogy between the proposed law and the N. R. A.: "The admission is made that this bill was drafted to meet the opinion of the Supreme Court setting aside the N. R. A." (*Ibid.*, p. 1492.)

(3) In the Third Session, the House Committee on Labor reported out S. 2475 with substantial amendments together with H. Rep. No. 2182 (75th Cong., 3rd Sess.) on April 21, 1938 (83 Cong. Rec. 5680). After prolonged debate, during which an amendment to make clear the Congressional purpose to exclude local retailers was made from the floor and

adopted, the House passed the Bill on May 24, 1938 (83 Cong. Rec. 7449).

(a) This Bill was of broad scope. The declared policy was "prohibiting the shipment in commerce of goods produced under substandard labor conditions" and "the elimination of" such "conditions in occupations *in* and *affecting* commerce" (Section 2(b)). It provided for the application of statutory wage and hour standards to employees of any "employer engaged in commerce in any industry *affecting commerce*" (Sections 4 and 5). An "employer engaged in commerce" was defined as "an employer in commerce, or an employer engaged, in the ordinary course of business, in *purchasing* or selling goods in commerce" (Section 3(k)). An "industry *affecting* commerce" included, among others, any industry found by the administrative authority to be "dependent for its existence upon substantial *purchases* or sales of goods in commerce and upon transportation in commerce". In this Bill, the "local retail capacity" exclusion was shifted, together with other exemptions, to a separate section (Section 11).

(b) The provision authorizing the administrative authority to bring businesses making "*purchases*" in interstate commerce within the Act brought forth considerable objection in the debates that local "retail establishments" might thereby be encompassed, despite the "local retailing capacity" exemption which was subject to delimitation by the administrative authority (*e. g.*, Representative Dies, 83 Cong. Rec. 7275; Representative Celler, *Ibid.*, p. 7393-7394). Chairman Norton took cognizance of this criticism, but, supported by Representative Healey speaking for the Committee, assured the House that, despite purchases in other states, "*local retailers" were excluded;* that it "is clearly understood" that *the Bill "absolutely exempts retailing"* (*Ibid.*, pp. 7281-7282); and that not even by the "wildest stretch of the imagination" and "regardless of any possible administrative interpretations" such businesses as the "local groceryman, druggist, clothing store, meat dealer—any merchant, in fact—laundry, hospital,

hotel, or even transportation companies operating solely within a State" were "absolutely not" in any way affected by the Bill (*Ibid.*, p. 7299). Representative Healy also stated that "*retail establishments are absolutely out of the provisions of the Bill*", because to include them "would exceed the powers of Congress" which is "limited by the Constitution to business in interstate commerce. (Applause)" (*Ibid.*, p. 7308).

(c) Not satisfied with these assurances, however, House members offered three amendments from the floor so as, "without equivocation or reservation" (Representative Celler, 83 Cong. Rec. 7393-7394), to exclude local retailers from the proposed Act. Successive amendments to Section 6, offered by Representatives Massingale and Pearson, which would have eliminated "*purchases*" in interstate commerce as a sufficient basis for the application of the Bill, were defeated on the insistence by Chairman Norton that the amendment was unnecessary as it had "been *stated time and time again that local retailing is exempt from the Bill*" (*Ibid.*, pp. 7436, 7437). The third amendment, offered by Representative Celler, that no order by the administrative authority under Section 6 of the Bill

"shall be applicable to any retail industry, the greater part of whose sales is in intrastate commerce"

was adopted after his plea to "dissolve all doubt, dispel all chance of misinterpretation" and to make "clear beyond peradventure of a doubt that retailing is exempted" and that "any industry whose sales are substantially in intrastate commerce shall be exempted from the operation of the Act" and after Chairman Norton's request that the amendment be accepted to clear up the doubt (*Ibid.*, p. 7438).

6. *Conference Report and Debate.*

The bills passed by the Senate and House, respectively, went to Conference. After changes in Conference in both Senate and House bills and a report (H. Rep. No. 2738

(75th Cong. 3d Sess.), 83 Cong. Rec. 9158, 9246), the report was agreed to and the Bill was enacted on June 14, 1938 by the Senate (*Ibid.*, p. 9178) and the House (*Ibid.*, p. 9266). The changes made in the bills by the Conference Committee confirm the express exemption given to local retailers under the amendment adopted during debate in the House and retained in Conference by the clear exclusion of them from the scope of the regulatory provisions (Sections 6 and 7) of the Act.

(1) The "local retailing capacity" exemption of both bills was retained (Section 13(a)(1)).

(2) The amendment to Section 6 of the House Bill excluding local retailers which was adopted during debate in the House (see paragraph 5(3)(c), *supra*) was retained.

(a) Because of the deletion of Section 6 (see paragraph (3)(b), *infra*), the provision was shifted to the section embracing the other exemptions (Section 13); the exemption was expanded to embrace local "service" as well as local "retail" businesses; and the provision was improved by substituting the word "establishment" for "industry," because of the use of "industry" elsewhere (Sections 3(h), 5 and 8) to refer to a group of businesses.

(b) That no change in scope was intended is shown by the Conference Report:

"Section 13 • • • includes an exemption from both the wage and hour provisions of employees of retail or service establishments the greater part of *whose business* is in intrastate commerce" (H. Rep. No. 2738, p. 32).

(3) Significant restrictions in the scope of the bills, particularly the House Bill, were made.

(a) The declared policy of the Act was made to read: "to eliminate" substandard "labor conditions" "in industries engaged *in* commerce or *in the production of goods for* commerce" (Section 2).

(b) The regulatory provisions were restricted to the wages and hours of "employees" and "industries" "engaged *in* commerce or *in the production of goods for* commerce" (Sections 5, 6, 7 and 8); every provision in the House Bill covering an "industry *affecting* commerce" or an industry making "*purchases* • • • in commerce" (see paragraph 5(3, a), *supra*) and even the provision in the Senate Bill including those producing and selling goods in one State in competition with goods from other States (see paragraph 4(1)(b), *supra*), were deleted.

(4) Debate in the Senate and House:

(a) The discussion in the Senate (83 Cong. Rec. 9165-9178) with respect to the scope and constitutionality of the Bill, in particular statements by Senators Borah (*Ibid.*, pp. 9166-9176, *passim*) and Wagner (*Ibid.*, p. 9173 with respect to the scope of the Wagner Act) was all directed toward the case of a manufacturer shipping goods in interstate commerce in response to criticism by Senator Bailey that regulation of the wages and hours of a manufacturer's employees was unconstitutional (*Ibid.*, pp. 9165-9175, *passim*). Accordingly, they have reference only to the scope of the provisions with respect to employees and industries "*engaged in the production of goods for commerce*" and have no bearing on the scope of the provisions with respect to those "*engaged in commerce.*"

(b) Statements by Senate members of Conference Committee:

"Neither House nor Senate yielded its convictions, but both Houses obtained their common objective, which was to abolish *traffic in interstate commerce* • • • in the products of underpaid and overworked labor. I think that many of the conference committee feel that our common objective has probably been more effectively and wisely obtained in the conference agreement than it would have been obtained in either the Senate or House bill" (Senator Thomas, 83 Cong. Rec. 9163).

After quoting the initial parts of Sections 6 and 7, Senator Pepper said,

"The conference committee had before it the question of whether this proposed law should be applied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce. * * * I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee" (*Ibid.*, p. 9168).

"All businesses engaged in interstate commerce and local retail establishments, the greater part of whose selling are goods that move in interstate commerce" are affected by the Bill. "*The Bill does not in any way affect purely local retail or service businesses*" (Senator Walsh, *Ibid.*, p. 9176).

(c) During debate in the House, Representative Schneider said,

"The measure as reported out by the conference report applies to interstate business exclusively. This is, of course, very well known. It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape or form affect interstate or purely local or State business. It covers only interstate commerce; that is, business which is interstate in character" (83 Cong. Rec. 9260).

SUPREME COURT OF THE UNITED STATES.

No. 608.—October Term, 1944.

A. H. Phillips, Inc., Petitioner,
vs.
L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 26, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Section 13(a)(2) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1067, 29 U. S. C. § 213(a)(2), states that the wage and hour provisions of the Act shall not apply with respect to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The issue posed by this case is whether employees working in the warehouse and central office of an interstate grocery chain store system are "engaged in any retail . . . establishment" within the meaning of Section 13(a)(2) so as to be exempt from the wage and hour provisions.

The petitioner corporation operates a chain of 49 retail grocery stores in cities and towns within a 35-mile radius from Springfield, Massachusetts. Of these stores, 40 are in Massachusetts and 9 are in Connecticut. Quite apart from these retail stores, petitioner maintains a separate warehouse and office building in Springfield in which work the employees involved in this case.

The warehouse is the only one maintained by petitioner and it services all the 49 stores. Except for bread, pastry and milk, which are secured from local sources, all of petitioner's merchandise is delivered by rail and truck to the warehouse where it is divided and then delivered by petitioner's trucks to the individual stores according to need. About 80% of the merchandise passing through the warehouse is received from outside Massachusetts, while about 18% of the total sales by dollar volume of the merchandise shipped from this warehouse is accounted for by petitioner's Connecticut stores. Each week a regular order is delivered

to each store from the warehouse and additional deliveries are made as required. Merchandise is supplied on the basis of requisitions prepared by individual store managers, subject to revision by one of the three superintendents in the central office. All of petitioner's sales are made exclusively at the retail stores and no deliveries to customers are made from the warehouse.

Employees in the central office, which is located in the same building as the warehouse, perform the usual functions of checking invoices, paying bills, making out payrolls, keeping inventory records, checking store deliveries and the like. The various employees in the warehouse and the truck drivers handle the physical work connected with the receipt, storage and shipment of merchandise. None of these employees segregates his time as between interstate and intrastate shipments; both types of shipments are handled indiscriminately to and from the warehouse.

On the basis of these facts, the Administrator of the Wage and Hour Division sought to enjoin petitioner from violating the overtime and record provisions of the Act. The District Court granted the injunction, holding (1) that the warehouse and central office employees were engaged in interstate commerce within the meaning of the Act and (2) that they were not exempted from the wage and hour provisions by reason of Section 13(a)(2) since the warehouse and office building did not constitute a retail establishment. 50 F. Supp. 749. The First Circuit Court of Appeals affirmed as to both points. 144 F. 2d 102. Petitioner, however, has sought review here only as to the second point. And certiorari was granted because of the conflicting views expressed on this issue by lower appellate courts.[1]

The Fair Labor Standards Act was designed "to extend the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within

[1] The decision below in this case is in accord with the reasoning of Walling *v.* American Stores Co., 133 F. 2d 840 (C. C. A. 3), but is in conflict with Allesandro *v.* C. F. Smith Co., 136 F. 2d 75 (C. C. A. 6), Walling *v.* L. Wiemann Co., 138 F.2d 602 (C. C. A. 7), and Walling *v.* Block, 139 F. 2d 268 (C. C. A. 9).

its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. We accordingly agree with the two courts below that the exemption contained in Section 13(a)(2) is inapplicable in this case and that the employees involved are entitled to the benefits of the wage and hour provisions of the Act. We hold, in other words, that the warehouse and central office of petitioner's chain store system cannot properly be considered a retail establishment within the meaning of Section 13(a)(2).

It is necessary, in the first place, to understand the true nature of petitioner's warehouse and office. The prime function of petitioner's chain store system is to sell groceries at retail. Like most large chains, however, petitioner has found it economically feasible to perform and integrate both the retail and wholesale functions of the grocery business. The independent wholesaler or middleman has been eliminated from the channel of distribution of petitioner's merchandise. Petitioner not only operates the retail outlets but purchases the merchandise in quantity from producers, stores it in a warehouse and systematically allots it to the individual stores. Certain economies in operation result from this direct mass buying and centralized merchandising control which would otherwise be impossible to achieve.[2] A warehouse and a central office such as petitioner maintains are vital factors in this integration of the retail and wholesale functions. They are necessary instruments for the successful performance of the wholesale aspects of a multi-function business of this type.

There are, to be sure, certain distinctions between the wholesale activities of a chain store system and those of an independent wholesaler. Thus a chain store enterprise does not customarily sell merchandise in its warehouse to retailers or other wholesale customers as does an independent wholesaler.[3] The goods stored in a chain store warehouse are merely distributed rather than sold to the retail stores. See *Liggett Co.* v. *Lee*, 288 U. S. 517, 537, 538. But this and other differences that can be found arise from the fact that the chain organizations have completely meshed the retail and wholesale functions. Many of the costs and risks

[2] See Beckman and Nolen, The Chain Store Problem (1938), pp. 48-50.

[3] Although petitioner's warehouse apparently does no wholesale business with independent retailers, many chain store warehouses sell certain quantities of merchandise to outside retailers in addition to supplying their own retail outlets. Beckman and Nolen, The Chain Store Problem (1938), p. 8.

normally assumed by the wholesale merchant because of his independent and competitive nature are eliminated by the chain store organization. The resulting savings and simplifications serve only to emphasize some of the major effects of the apparent trend away from the independent middleman in our economy of distribution.[4] The disappearance of the independent middleman, together with many of his separate operations and charges, does not mean, however, that his essential intermediary or wholesale function of moving goods from producer to retailer has been abolished. In this instance it has only been taken over by the retailer, acting through its own distinct wholesale units.[5]

In a realistic sense, therefore, most chain store organizations are merchandising institutions of a hybrid retail-wholesale nature. They possess the essential characteristics of both the retailer and the wholesaler. Their wholesale functions, which are integrated with but are physically distinct from their retail functions, are performed through their warehouses and central offices. That fact is the essential key to the problem presented by this case. It serves to make clear the inapplicability of Section 13(a)(2) to petitioner's warehouse and central office employees.

Section 13(a)(2) by its very terms exempts only those employees engaged in a retail or service establishment operating primarily in local commerce. Petitioner claims that its retail stores, warehouse and central office together constitute a "retail establishment" within the meaning of this exemption. The lack of merit in this claim is obvious. Even if, as petitioner urges, the word "establishment" referred to an entire business or enterprise, the combined retail-wholesale nature of petitioner's inter-

[4] Does Distribution Cost Too Much?, Twentieth Century Fund (1939), pp. 81-85, 100-110, 178-181, 345-346; Beckman and Nolen, The Chain Store Problem (1938), pp. 7-9, 42-61; 15 Encyclopaedia of the Social Sciences (1935), pp. 411-416.

[5] "While it is frequently said that the function of wholesaling is vital even though the wholesaler may not be in every line, some amplification of this remark seems advisable. *Some agency must provide the machinery to move all merchandise from the producer to the retailer. Regardless of what this function is called, it is essentially the same as wholesaling.* . . . Chain stores, once they assume enough importance to justify a warehouse, are engaged in wholesaling as well as retailing. Whatever goods are handled at retail outlets must be bought in quantity, handled in the warehouse and allotted to the individual stores in much the same way that wholesalers would serve the independent dealers." Chamber of Commerce of the United States, National Wholesale Conference, Report of Committee I, Wholesalers' Functions and Services (1929), pp. 13-14.

te business would prevent it from properly being classified a local "retail establishment." But if, as we believe, Con-ess used the word "establishment" as it is normally used in siness and in government[6]—as meaning a distinct physical place business—petitioner's enterprise is composed of 49 retail es-blishments and a single wholesale establishment. Since the ployees in question work in the wholesale establishment, Sec-n 13(a)(2) is plainly irrelevant.

Moreover, it is quite apparent from the sparse legislative his-ry of Section 13(a)(2) that Congress did not intend to exempt a "retail establishment' the warehouse and central office of interstate chain store system. From the standpoint of its gislative ancestry, Section 13(a)(2) is the offspring of a mani-st desire to exclude from the scope of the Act "business in the veral States that is of a purely local nature." Sen. Rep. 884, th Cong., 1st Sess., p. 5. Congress was interested in exempting ose regularly engaged in local retailing activities and those em-oyed by small local retail establishments, epitomized by the rner grocery, the drug store and the department store.[7] It lt that retail concerns of this nature do not sufficiently influence e stream of interstate commerce to warrant imposing the wage d hour requirements on them. *Ibid*, p. 5. Section 13(a)(2) a part of the Act only because of the fear that Section 13(a)(1),

[6] Prior to the adoption of the Fair Labor Standards Act the term "estab-hment" was used in the sense of physical place of business by many sus reports, business analyses, administrative regulations, and state taxing d regulatory statutes. As applied to chain store systems, "establishment" s described each unit in the chain. For example, under the N. R. A. des of Fair Competition, prepared by committees from the industries ncerned, retail stores of a grocery chain were subject to the Retail Food d Grocery Trade Code, while the chain store warehouses and central offices re treated as separate "establishments" subject to the Wholesale Food d Grocery Trade Code. See N. R. A. Codes of Fair Competition, Vol. IV, 460-1, 470, and Vol. V, pp. 5-6, 13-14.

[7] The original language of Section 13(a)(2), introduced as as amendment Representative Celler, applied to any retail "industry." Representative ller stated that if the amendment were accepted "retail dry goods, retail tchering, grocers, retail clothing stores, department stores will all be empt." Several other Congressmen expressed their desire to assure the mption of "the corner grocery store man or the filling station man" and he local groceryman, druggist, clothing store, meat dealer—any merchant fact." 83 Cong. Rec. 7299, 7436-7438. The exemption as it finally emerged m the joint House-Senate conference committee applied to any retail "es-blishment" rather than "industry." The use of the word "establish-nt" is more appropriate to the small local retailers which Congress had mind and clearly indicates that Congress meant by it something less or fferent than "industry" or "enterprise."

in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571.

Here petitioner's warehouse and central office employees are performing wholesale duties in the very midst of the stream of interstate commerce. They constantly deal with both incoming and outgoing interstate shipments. Such tasks are completely unlike those pursued by employees of the small local retailers, who were the sole concern of Congress in Section 13(a)(2). These duties, rather, are economically, functionally and physically like those of the independent wholesaler's employees who, when engaged in interstate commerce, are admittedly entitled to the benefits of the Act. We fail to perceive in Section 13(a)(2) or in its Congressional background any intent to discriminate against chain store employees engaged in wholesale activities or to give to chain store warehouses a competitive advantage in labor cost over independent wholesalers.

We are thus unable to say that the warehouse and central office employees of petitioner's interstate chain store system plainly and unmistakably fall within either the terms or the spirit of the exemption specified in Section 13(a)(2). Economic facts, legal principles and consistent and thorough administrative interpretation[8] of the exemption all compel the conclusion that Section 13(a)(2) is not applicable to the facts of this case. We therefore affirm the judgment of the court below.

Affirmed.

The CHIEF JUSTICE, Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result.

Mr. Justice ROBERTS dissents.

---

[8] See Interpretative Bulletin No. 6, United States Department of Labor, Wage and Hour Division, originally issued in December, 1938, and revised in June, 1941. See also First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor (1940), p. 21, informing Congress that "each physically separated store of a chain of stores will be considered a separate 'retail establishment.' The warehouses and central executive offices of the chain are not 'retail establishments.'"